

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE WESTERN DISTRICT OF TEXAS**
 AUSTIN DIVISION

3 UNITED STATES OF AMERICA,) AU:10-CR-00297(1)-LY
)
4 Plaintiff,)
)
5 VS.) AUSTIN, TEXAS
)
6 DAVID ANDREW DIEHL,)
)
7 Defendant.) FEBRUARY 8, 2011

8 *****

9 TRANSCRIPT OF BENCH TRIAL VERDICT

10 BEFORE THE HONORABLE LEE YEAKEL

11 VOLUME 2 OF 2

12 *****

12 APPEARANCES:

13 FOR THE PLAINTIFF: MATTHEW B. DEVLIN
 ASSISTANT UNITED STATES ATTORNEY
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15 FOR THE DEFENDANT: STEPHEN M. ORR
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24 Proceedings recorded by computerized stenography, transcript
25 produced by computer.

10:04:39 1 (Open Court, Defendant present)

10:04:39 2 THE COURT: Let the record reflect that we're here
10:04:41 3 this morning on *United States v. David Andrew Diehl*, Criminal
10:04:46 4 Number A-10-CR-297-LY, which the Court conducted a bench trial
10:04:53 5 yesterday. I'll hear announcement from the parties at this
10:04:55 6 time.

10:04:56 7 MR. DEVLIN: Matthew Devlin for the United States,
10:04:58 8 Your Honor.

10:04:58 9 MR. ORR: Steve Orr for Mr. Diehl, Your Honor. We're
10:04:59 10 ready.

10:04:59 11 THE COURT: All right. And the record reflects that
10:05:01 12 Mr. Diehl, the defendant, is in fact present in the courtroom.

10:05:04 13 Both sides rested and closed the evidence in this
10:05:10 14 case yesterday and presented summations to the Court. And the
10:05:15 15 Court recessed for the evening to deliberate, and I will render
10:05:22 16 my verdict here this morning. I'll make a few comments in the
10:05:31 17 nature of findings and conclusions before rendering any
10:05:35 18 verdict.

10:05:35 19 This defendant, David Diehl, is charged in the second
10:05:37 20 superseding indictment with ten counts of sexual exploitation
10:05:41 21 of a child and production of child pornography, in violation of
10:05:48 22 Title 18, United States Code, Section 2251(a). That section
10:05:53 23 makes it a crime for any person to employ, use, persuade,
10:05:56 24 induce, entice, or coerce a minor to engage in sexually
10:06:00 25 explicit conduct for the purpose of producing a visual

10:06:03 1 depiction of the conduct, if the visual depiction has been
10:06:10 2 transported in interstate commerce or mailed.

10:06:13 3 Among the evidence the Court has presented to it is
10:06:18 4 the agreed stipulation of facts and evidence that was entered
10:06:23 5 into by the parties in this case, and the Court has thoroughly
10:06:28 6 considered each and every part of that stipulation. The Court
10:06:34 7 further has carefully considered the testimony of the witnesses
10:06:41 8 that testified yesterday, Special Agent Sean Mullen of the
10:06:45 9 Federal of Bureau of Investigation; Ms. Kerry Jenkins, the
10:06:51 10 former wife of the defendant; Mr. Kennedy -- excuse me --
10:06:59 11 Mr. Kenneth Courtney, a former friend of the defendant; and
10:07:05 12 then, lastly, the testimony of the defendant's son.

10:07:12 13 In addition, the Court has reviewed each of the
10:07:16 14 exhibits that were introduced by the Government to the extent
10:07:19 15 that, with regard to the video portions, the Court reviewed
10:07:27 16 Government's Exhibit 13, which was the compilation of all of
10:07:33 17 the video snippets. And I have further reviewed the other
10:07:41 18 exhibits which were not in video format. So I have thoroughly
10:07:45 19 reviewed everything in this case.

10:07:51 20 This defendant, David Diehl, may be found guilty of
10:07:54 21 this crime only if the Government proves each of the following
10:07:59 22 elements beyond a reasonable doubt: One, an actual minor; that
10:08:01 23 is, a real person who was less than 18 years of age was
10:08:04 24 depicted. The Court finds beyond any doubt that an actual
10:08:11 25 minor; that is, a real person who was less than 18 years of

10:08:15 1 age, was depicted. Each of Jane Does 1, 2, and 3 satisfy that
10:08:22 2 paragraph of section 2251(a).

10:08:26 3 The second thing the Government must prove beyond a
10:08:28 4 reasonable doubt is that the defendant, David Diehl, employed,
10:08:32 5 used, persuaded, induced, enticed, or coerced the minor to take
10:08:38 6 part in sexually explicit conduct for the purpose of producing
10:08:42 7 a visual depiction. For example, a videotape or a digital
10:08:47 8 video of the conduct.

10:08:49 9 The exhibits, including Government's Exhibit 13,
10:08:53 10 which the Court reviewed -- I believe it was 13. Am I correct
10:08:58 11 on that? That was the compilation.

10:09:00 12 MR. DEVLIN: That was the compilation. And as well
10:09:02 13 as 7, which was separate as well because that couldn't be on
10:09:06 14 the compilation.

10:09:08 15 THE COURT: -- clearly satisfies the videotape or
10:09:10 16 digital video component. The events portrayed on those items
10:09:21 17 were sexually explicit and clearly, again, beyond any doubt in
10:09:28 18 the Court's mind reflect that the defendant, at a minimum,
10:09:33 19 employed the minors, Jane Does 1, 2, and 3, to take part in
10:09:40 20 sexually explicit conduct and did in fact produce a visual
10:09:44 21 depiction of that.

10:09:47 22 Where issue is primarily joined between the
10:09:51 23 Government and the defendant is in the third element, that the
10:09:55 24 visual depiction was mailed or actually transported in
10:09:58 25 interstate or foreign commerce. The Court observes that

10:10:03 1 Section 2251(a) of Title 18 of the United States Code provides
10:10:09 2 that punishment may be imposed on a defendant if the defendant
10:10:13 3 knows or has reason to know that such visual depiction will be
10:10:17 4 transported or transmitted using any means or facility of
10:10:22 5 interstate or foreign commerce or in affecting interstate or
10:10:26 6 foreign commerce or mailed, if the visual depiction was
10:10:30 7 produced or transmitted using materials that have been mailed,
10:10:33 8 shipped, or transported in or affecting interstate or foreign
10:10:36 9 commerce by any means, including by computer, or if the visual
10:10:41 10 depiction has actually been transported or transmitted using
10:10:45 11 any means or facility of interstate or foreign commerce or
10:10:49 12 in affecting interstate or foreign commerce or travel.

10:10:54 13 That is what I have termed during the trial, that
10:10:57 14 last portion I read, the third clause of Subsection (a) of
10:11:02 15 Section 2251, the third clause of the interstate nexus
10:11:07 16 requirement.

10:11:08 17 So I focus here on whether the visual depiction has
10:11:15 18 actually been transported or transmitted using any means or
10:11:20 19 facility of interstate or foreign commerce or in affecting
10:11:23 20 interstate or foreign commerce or mailed. The defendant
10:11:31 21 asserts that there is a scienter test, that he had to have
10:11:37 22 intended that transportation and that there is no evidence of
10:11:40 23 that.

10:11:41 24 In *Runyan*, which we discussed yesterday, the Fifth
10:11:51 25 Circuit examined the interstate nexus. But the basic facts of

10:11:55 1 *Runyan* involved more the first clause of the interstate nexus
10:12:07 2 paragraph of Subsection (a) of Section 2251. That was whether
10:12:11 3 the person knows or has reason to know that the visual
10:12:14 4 depiction will be transmitted in interstate commerce.

10:12:19 5 However, the ruling in *Runyan* is instructive here,
10:12:23 6 where -- and I think and, in my opinion, and I hold that it
10:12:27 7 applies to all three of the interstate nexus provisions of
10:12:32 8 Subsection (a). And that portion on page 239 of the *Runyan*
10:12:38 9 opinion, where the Fifth Circuit says: "We join the
10:12:41 10 First Circuit in holding that transmission of photographs by
10:12:45 11 means of the Internet is tantamount to moving photographs
10:12:48 12 across state lines and thus constitutes transportation in
10:12:52 13 interstate commerce for the purposes of Title 18, United States
10:12:56 14 code, Section 2251."

10:12:59 15 Here the evidence is clear, and the Government has
10:13:04 16 proved beyond a reasonable doubt, that the production of the
10:13:10 17 visual depictions occurred within the Western District of
10:13:14 18 Texas, within the State of Texas, and that thereafter these
10:13:22 19 depictions or copies of depictions or however you want to refer
10:13:29 20 to it on the interstate -- I mean, on the Internet were in fact
10:13:36 21 seized in the States of Maryland, New Jersey, Indiana,
10:13:44 22 Australia, and Arizona, depending on which of the counts of the
10:13:48 23 indictment you were looking at.

10:13:49 24 The Court of course takes notice that those states
10:13:52 25 that the Court just mentioned are not the State of Texas. Even

10:13:57 1 the foreign state is not the State of Texas. Obviously, the
10:14:02 2 depictions moved from the State of Texas to those states in
10:14:08 3 some manner.

10:14:12 4 The Court finds that it defies common sense to say
10:14:16 5 therefore that the depictions did not move in interstate
10:14:18 6 commerce. And I reject the defense's argument that it takes
10:14:21 7 more than what has been shown by the Government to show that,
10:14:24 8 under the third interstate nexus clause of Subsection (a) of
10:14:31 9 Section 2251, that more had to be shown.

10:14:34 10 The facts are clear beyond a reasonable doubt that
10:14:40 11 the production of the child pornography occurred within the
10:14:46 12 state of Texas and that it appeared in other states and,
10:14:52 13 therefore, the Court finds that is enough to show that it had
10:14:57 14 been transported or transmitted using any means or facility of
10:15:01 15 interstate or foreign commerce.

10:15:04 16 The Government argues that there is no scienter
10:15:19 17 requirement with regard to the third clause. The defendant
10:15:24 18 argues that there is. The Court has reviewed all of the
10:15:28 19 authorities presented by each party including the lengthy
10:15:35 20 article from volume 22 of the Hawaii Law Review, beginning
10:15:42 21 page 73. The Court finds that law review article instructive
10:15:48 22 but does not establish that there is a scienter or mens rea
10:15:54 23 requirement. Looking particularly in the language in the law
10:15:57 24 review article on page 13, the author appears to concede that
10:16:03 25 there is not when he states each of the statutes. And he's

10:16:08 1 referring to 2252 and 2251, there in the Court's opinion, says
10:16:21 2 that they would either expressly require either the movement of
10:16:24 3 or the intent to move the child pornography itself. The Court
10:16:27 4 has held that there was movement of the child pornography
10:16:35 5 itself.

10:16:37 6 The author then argues throughout the article that
10:16:41 7 the -- it is poor policy and that the Congress should not be
10:16:45 8 federalizing each and every crime and that the Congress is in
10:16:53 9 fact removing traditional things or traditional enforcement
10:16:59 10 that was previously left to the states.

10:17:01 11 The author may or may not be correct on that. The
10:17:04 12 fact is that Congress is federalizing more and more crimes.
10:17:08 13 And I hope that, in this particular case, under this particular
10:17:14 14 statute, that the Congress did in fact federalize what the
10:17:21 15 Congress found to be the crime. And that is the employment,
10:17:30 16 use, persuasion, inducement, enticement, or coercion of any
10:17:34 17 minor to engage in sexually explicit conduct for the purpose of
10:17:43 18 producing any visual depiction of such conduct.

10:17:49 19 Here we have visual depictions of sexually explicit
10:17:53 20 material involving employment of a minor that did in fact move
10:18:01 21 in interstate commerce. Therefore, I find the Government has
10:18:03 22 satisfied its burden on all three of the elements of the
10:18:08 23 statute.

10:18:09 24 Therefore, in accordance with those findings and
10:18:12 25 conclusions which I have rendered here this morning in Open

10:18:16 1 Court at the conclusion of yesterday's trial, I find beyond a
10:18:20 2 reasonable doubt that the defendant, David Diehl, is guilty of
10:18:24 3 the offense charged in count 1 of the second superseding
10:18:27 4 indictment, guilty of the offense charged in count 2 of the
10:18:31 5 second superseding indictment, guilty of the offense charged in
10:18:34 6 count 3 of the second superseding indictment, guilty of the
10:18:38 7 offense charged in count 4 of the second superseding
10:18:41 8 indictment, guilty of the offense charged in count 5 of the
10:18:45 9 second superseding indictment, guilty of the offense charged in
10:18:49 10 count 6 of the second superseding indictment, guilty of the
10:18:53 11 offense charged in count 7 of the second superseding
10:18:56 12 indictment, guilty of the offense charged in count 8 of the
10:19:00 13 second superseding indictment, guilty of the offense charged in
10:19:04 14 count 9 of the second superseding indictment, and guilty of the
10:19:08 15 offense charged in count 10 of the second superseding
10:19:12 16 indictment.

10:19:13 17 And I have signed a verdict to that effect, which I
10:19:16 18 now pass to the clerk for entry in the record of this Court.

10:19:23 19 Sentencing will be set at a later date, and an order
10:19:29 20 will be forthcoming.

10:19:32 21 Now, if you will give me a moment before we recess, I
10:19:35 22 have something I need to review here.

10:20:00 23 All right. I have received this morning a letter
10:20:04 24 dated October the 2nd, 2011 from the defendant, David Diehl,
10:20:13 25 which complains of both his attorney and the Government

10:20:18 1 attorney. Ms. Jones, I am passing this to you at this time,
10:20:22 2 and please file that in the record and make copies for both
10:20:28 3 Mr. Orr and Mr. Devlin. I will say before I close this record
10:20:34 4 that I think, in my opinion, the defendant has been extremely
10:20:39 5 well represented in this case. I believe that Defendant's
10:20:45 6 counsel, Mr. Orr, has made every argument that could possibly
10:20:49 7 be made on the defendant's behalf in this case.

10:20:52 8 I simply find beyond a reasonable doubt and,
10:20:57 9 actually, in my mind, beyond any doubt that the defendant is
10:21:02 10 guilty of the offenses that were charged in the second
10:21:06 11 superseding indictment.

10:21:10 12 Mr. Devlin, Mr. Orr, do either of you have anything
10:21:13 13 you would like to present this morning or anything you need to
10:21:17 14 address with the Court while I have you present?

10:21:20 15 MR. DEVLIN: No, Your Honor.

10:21:21 16 THE COURT: Mr. Orr?

10:21:21 17 MR. ORR: No, Your Honor.

10:21:22 18 THE COURT: Then at this time the Court is in recess,
10:21:25 19 and sentencing will be set at a later date.

10:21:28 20 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States

10 WITNESS MY OFFICIAL HAND this the 7th day of March 2011.

11

12 /S/ Arlinda Rodriguez
13 Arlinda Rodriguez, Texas CSR 7753
14 Expiration Date: 12/31/2012
15 Official Court Reporter
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ARLINDA L. RODRIGUEZ, OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)